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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

T. J. HAYES **83-6009** PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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T. J. HAYES PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

Petitioner, T. J. Hayes, a prisoner under sentence of death, petitions for a writ of certiorari to review the denial, by the Supreme Court of Arkansas, of his petition for post-conviction relief from his conviction and sentence of death for the offense of capital murder.

QUESTION PRESENTED

Whether a capital defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights are violated when a state Supreme Court refuses an evidentiary hearing on a petition for post-conviction relief, when the defendant has made a prima facie showing of need for hearing under terms of the post-conviction relief rule and the rationale for the denial conflicts with the requirements of the rule.

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APPENDIX

A. PETITION FOR PERMISSION TO PROCEED UNDER RULE 37, ARK. R. CRIM. P.

B. OPINION OF SUPREME COURT DENYING PETITION (DUDLEY AND PURTLE, J.J., DISSENTING)

OPINION BELOW

The original opinion of the Supreme Court of Arkansas, denying the Petition for Permission to Proceed Under Rule 37, is reproduced in the appendix, including the dissent by Justices Dudley and Purtle. It is reported at Hayes v. State, 280 Ark. 509, _____S.W. 2d _____(1983).

JURISDICTION

The decision of the Supreme Court of Arkansas denying the Rule 37 petition was issued on November 2, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3), with Petitioner Hayes asserting a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be...deprived of life, liberty or property without due process of law;...

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...and to have the assistance of counsel for his defense.

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> ...(N)or shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

Ark. Stat. Ann. 41-1501(1):

> A person commits capital murder if:...(c) with the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode.

Rule 37, Arkansas Rules of Criminal Procedure:

> Rule 37.1 Scope of Remedy
>
> A prisoner in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
> (a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state: or
> (b) that the court imposing the sentence was without jurisdiction to do so; or
> (c) that the sentence was in excess of the maximum authorized by law; or
> (d) that the sentence is otherwise subject to

collateral attack; may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

Rule 37.2 Commencement of Proceedings; Pleadings; Permission of Supreme Court Following Appeal

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this Rule shall be entertained by the circuit court without prior permission of the Supreme Court.

(b) All grounds for relief available to a petitioner under this rule must be raised in his original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction and sentence, or in any other proceeding that the prisoner may have taken to secure relief from his conviction or sentence, may not be the basis for a subsequent petition.

(c) A petition claiming relief under this rule must be filed in circuit court or, if prior permission is necessary as indicated in paragraph (a) in the Supreme Court within three (3) years of commitment, unless the ground for relief would render the judgment of conviction absolutely void.

(d) The decision of the court in any proceeding under this rule shall be final when the judgment is rendered. No motion for rehearing shall be considered.

(e) Before the court acts upon a petition filed under this rule, the petition may be amended with leave of court.

Rule 37.3. Nature of Proceedings; Summary Disposition; Appointment of Counsel; Evidentiary Hearings; Presence of Petitioner

(a) If the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or record that are relied upon to sustain the court's findings.

(b) If the original motion, or a motion to take an appeal from the court's findings under subsection (a) hereof, shall allege that the prisoner is unable to pay the cost of the proceedings or to employ counsel and if the court is satisfied that this allegation is true, the circuit court shall appoint counsel for the prisoner for hearing

in the circuit court and for appeal to the Supreme Court.

(c) When a motion is filed in the circuit court mentioned in Rule 37.1 and the court does not dispose of the motion under subsection (a) hereof, the court shall cause notice of the filing thereof to be served on the prosecuting attorney and on the motion the court shall grant a prompt hearing with proceedings reported. Objections to the court's rulings are required, but exceptions need not be saved. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto. If the prisoner desires to be present at the hearing for the taking of testimony, the court shall order his presence.

Rule 37.4 Relief:

If the circuit court finds that for any reason the prisoner is entitled to any relief, then the circuit court may set aside the original judgment, discharge the prisoner, resentence him, grant a new trial or otherwise correct the sentence, as may appear appropriate in the proceedings.

Rule 37.5 Attorneys Fees

The circuit court may award fees to attorneys representing indigent persons under this rule as provided by Ark. Stat. Ann. 43-2415 et seq. (Repl. 1964)

STATEMENT OF THE CASE

Petitioner was charged with capital murder (Ark. Stat. Ann. 41-1501 Repl. 1977) in the Circuit Court of Jefferson County, Arkansas. He is alleged to have killed two persons in the same episode; the statute (Ark. Stat. Ann. 41-1501(1)(c) requires that it be done in a "premeditated and deliberated" fashion.

Petitioner was found to be indigent, and has been represented by appointed counsel at all stages where counsel was present. The homicides occurred on July 16, 1979. Petitioner's first trial was in February, 1981. He was convicted and sentenced to death. This conviction was reversed and remanded due to the failure to provide Petitioner's psychiatric records to the defense. Hayes v. State, 274 Ark. 440, 625 S.W. 2d 498 (1981). He was retried in May, 1982 and again convicted and given a sentence of death. This conviction and sentence were affirmed by the Arkansas Supreme Court. Hayes v. State, 278 Ark. 211, 645 S.W. 2d 662 (1983). Certiorari was denied by the U.S. Supreme Court on October 3, 1983. On October 11, 1983 Governor Clinton set November 11, 1983 as an execution date. Petitioner, through current counsel, then filed a Petition for Stay of Execution and, concurrent with it, a Petition for Permission to Proceed Under Rule 37 (the state postconviction procedure) on October 25, 1983. These were denied on November 2, 1983.

Hayes v. State, 280 Ark. 509, ____ S.W.2d____(1983). A copy of the Court's opinion, including the dissenting statement of two justices, is appended. On November 7, 1983 Justice Blackmun granted a stay of execution to permit Petitioner to petition for writ of certiorari to review the decision of the Arkansas Supreme Court. This document is that petition.

In his Rule 37 petition, Petitioner sought a hearing to fully litigate numerous issues, including but not limited to effectiveness of counsel in matters such as failure to pursue speedy trial claims, failure to conduct adequate voir dire, failure to object at numerous junctures, failure to present evidence in the penalty phase, et al. The Arkansas Supreme Court denied all claims without permitting a hearing. It is this denial without a hearing that forms a large part of the merits of this petition.

REASON FOR GRANTING THE WRIT

THE STATE'S DENIAL OF A HEARING TO PETITIONER ON HIS REQUEST FOR POST-CONVICTION RELIEF, VIOLATES HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND VITIATES PUBLIC POLICY.

This case affords the Court an opportunity to delineate the obligation of state courts, in a capital case, to provide a proper forum for litigation of meritorious post-conviction claims. The Court may also decide whether the denial of access to a hearing, when done in a manner inconsistent with the state's outlined procedure, violates a cognizable constitutional right and emerging public and judicial policy.

This issue is especially timely in the light of doctrine discouraging use of the federal habeas corpus remedy when state procedures are available. Engle v. Isaac, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed. 2d 783 (1982). Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). Anderson v. Harless, ____ U.S. _____, 74 L. Ed. 2d 3 (1983).

Arkansas has a specific procedure for post conviction relief, embodied in Rule 37 of the Arkansas Rules of Criminal Procedure, reproduced in the listing of constitutional provisions and statutes involved. The Rule provides that the circuit court (which is the trial court) will hold an evidentiary hearing unless the pleadings and record "conclusively establish" that the petitioner is not entitled to relief. Rule 37.3. If the case has been appealed, the prior per-

mission of the Arkansas Supreme Court is required. Hayes was denied this requested permission, and thus brings this petition for writ of certiorari.

Hayes, in his Petition for Permission to Proceed (reporduced in the appendix) outlined a number of points in which he i)asserted that he had been denied effective assistance of counsel or some other right; ii) outlined what the record of the case, as currently established, was; and iii) what needed to be established in an evidentiary hearing. He also noted that under Arkansas procedure this was his first opportunity to litigate effectiveness of counsel, and, in this area especially, certain of the issues required the taking of additional testimony. Hilliard v. State, 259 Ark. 81, 531 S.W. 2d 463 (1976). Knappenberger v. State, 278 Ark. 382, 647 S.W. 2d 417 (1983).

The Arkansas Supreme Court, however, denied his petition with remarks that Hayes had failed to "prove" his allegations, despite the fact that the petition noted numerous times what the status of the evidence was, what the law was, and what needed to be more fully developed.

For example: Petitioner submitted that he had been denied a speedy trial, and that his trial counsel had been ineffective in not raising the issue in the proper format. Under Arkansas procedure a person confined to the penitentiary on another charge must be tried within twelve months (less excluded periods), while the normal limit is eighteen months. Petitioner noted and cited the law, noted that nineteen months had elapsed between

his arrest and trial, and noted the numerous places in the record which demonstrate that he was confined to the penitentiary during the period before his first trial. In his petition, at pp. 5-6, he stated:

> Petitioner submits that an evidentiary hearing is necessary on the following points. When, precisely, was Petitioner committed to prison? Precisely what periods between his arrest and first trial were excludable, and for what reasons. If the periods total less than seven months--and the record certainly indicates that they are significantly less than seven--he is entitled to dismissal.

However, the Arkansas Court claimed that Petitioner did "not give any factual support for his claim that a hearing would demonstrate the denial of a speedy trial." This claim was made despite the numerous citations referred to above.

Another example: Petitioner cited the numerous shortcomings of counsel on voir dire, including the fact that it was so abbreviated that no significant questions were asked of many veniremen. Petitioner asked for a hearing to present expert testimony with regard to the inadequacy of this type of voir dire in a capital case. The Court denied this point with the remark that no juror was shown to be unqualified to serve, and that Petitioner had not demonstrated prejudice. However, Petitioner had noted the points of inadequacy, the fact that he had received the death penalty, and exactly why an evidentiary hearing was needed.

Another example: Petitioner noted that no evidence was presented in mitigation. (P. 11 of petition). Petitioner noted that a statutory mitigating circumstance is whether the capital murder "was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse." Ark. Stat. Ann. 41-1304. Petitioner noted that in the record there was a report from a Dr. Krulin containing evidence in support of that mitigating circumstance (T 22) but that the doctor was not called. Petitioner noted that a hearing was necessary to explain all the details of Dr. Krulin's testimony, and for defense counsel to explain why he was not called. (P. 12). The Court held that the petition did not state grounds to find that counsel "should have called" a witness. However, Petitioner noted that at this point he was limited to the record and desired to develop the record.

There are other examples. But what this recitation demonstrates is that, although the Rule 37 does not require it, the Arkansas court required Petitioner to "prove" allegations that can not be "proven" satisfactorily without the opportunity to develop a record. When a record is absent or incomplete, that quantum of proof cannot be made, but Pe-

titioner complied with the wording of the Rule by citing all that the record of the case showed, and what a hearing would show.

The failure of a state court to comply with its procedural requisites is a violation of due process. Hicks v. Oklahoma. 447 U.S. 343 (1980). Even moreso, a state's wrongful refusal to permit a capital defendant to litigate ineffective assistance of counsel, when the federal courts are emphasizing the role of the state courts in these matters, runs contrary to public policy. Petitioner respectfully submits that he has valid Fifth, Sixth anf Eighth Amendment claims (extended through the Fourteenth), which Arkansas has denied him by denying him access to a hearing.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted and the holding of that Court reversed. This Court should set oral argument on the issues outlined above.

Respectfully submitted:

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THIS IS A CAPITAL CASE
EXECUTION DATE HAS BEEN SET

IN THE SUPREME COURT OF ARKANSAS

T. J. HAYES PETITIONER

VS. CR 82-113

STATE OF ARKANSAS RESPONDENT

ORIGINAL PETITION FOR PERMISSION TO PROCEED PURSUANT TO RULE 37, A.R. CRIM. P.

Comes the Petitioner, T.J. Hayes, through his attorney, Jeff Rosenzweig, serving pro bono publico, and for his Petition for Permission to Proceed pursuant to Rule 37 states:

1. Petitioner was charged with capital murder (Ark. Stat. Ann. 41-1501) in the Circuit Court of Jefferson County. He is alleged to have premeditatedly and deliberately killed two persons in the same criminal episode on or about July 16, 1979. He was first tried in February, 1981, and convicted of capital murder and sentenced to death. The conviction and sentence were reversed by the Arkansas Supreme Court because his psychiatric records were not provided to defense counsel. Hayes v. State, 274 Ark. 440, 625 S.W. 2d 498 (1981). Petitioner was retried in May, 1982 and again convicted and given a sentence of death. This conviction was affirmed by the Arkansas Supreme Court. Hayes v. State, 274 Ark. 211, 645 S.W. 2d 662 (1983). Certiorari was denied by the U.S. Supreme Court on October 3, 1983. On October 11, 1983, Governor Clinton set November 11 as Petitioner's date of execution. Concurrent with this

petition, Petitioner is filing an application for stay of execution pending disposition of this petition on the merits.

2. This Court has promulgated through the aforementioned Rule 37, an avenue of post-conviction relief. This pleading is timely filed, being within three years of a commitment not reversed and remanded, and being within three years of his original commitment anyway. Certain matters relate back to the original trial, but this is Petitioner's first opportunity to deal with them under Arkansas procedural rules.

3. Petitioner is also cognizant of the numerous opinions of the Court dealing with the proper scope of Rule 37. Petitioner has, in good faith, organized this petition in such fashion as to comply with the Court's requirements of precision, clarity, brevity, citations to the record and demonstrations of prejudice.

4. Petitioner thus organizes this pleading in the following manner: First, the particular infraction against his rights is described. Second, the factual basis in the record is cited and, when necessary, quoted. Third, the constitutional and/or statutory derivation of the right is cited. Fourth, the manner in which Petitioner was prejudiced is noted. Fifth, the matters that require further development in an evidentiary hearing are listed.

5. Petitioner is also constrained to note that in the event that he must seek relief in the federal system, he must exhaust all state remedies. 28 U.S.C. 2254(b). Petitioner also submits this pleading in good faith, and not for purposes of delay.

6. Petitioner also emphasizes that what is being sought is permission to proceed to an evidentiary hearing in the Jefferson Circuit Court (although there is no objection to the Court summarily vacating the conviction at this time). Petitioner cites the supporting places in the record as the factual underpinning for the allegations in this petition. However, certain issues, for further development, will require the taking of additional testimony. These are identified herein.

7. Moreover, this Court has held that a post-conviction evidentiary hearing is the first juncture at which a criminal defendant may raise issues such as ineffectiveness of trial counsel. Hilliard v. State, 259 Ark. 81, 531 S.W. 2d 463 (1976). This concept was recently reiterated in Knappenberger v. State, 278 Ark. 382, 647 S.W. 2d 417 (1983). Petitioner respectfully submits that it would be an abuse of this Court's discretion and a violation of his federal and state guarantees of due process, equal protection, fair trial and effective assistance of counsel, to deny him an evidentiary hearing.

SPEEDY TRIAL

Petitioner was denied his right to a speedy trial between his arrest and his first trial. He was also denied effective assistance of counsel by the failure of either attorney--for the first or second trial--to raise the issue in the appropriate format. This is his first opportunity to litigate this issue from the correct format and the perspective of ineffectiveness of counsel.

Petitioner was arrested on July 16, 1979, shortly after the commission of the homicides for which he was convicted. This is clear from the original opinion of the Court reversing his first conviction and throughout the record. There is no controversy as to the date of arrest. Subsequently thereto, Petitioner was reconfined in the Arkansas Department of Correction on a revocation of parole. This is confirmed through, inter alia, the existence of orders signed by Judge Williams ordering that Petition be brought from Cummins to the psychiatrist's office or to court, and located in the record of the original case at T. 11, 76, 85, 86, 93, 95, and 97.

Petitioner's original trial counsel moved to dismiss on the basis of failure to try Petitioner within three terms of court. This was denied in the original appeal. The motion was renewed in the second trial, with an additional argument about the 9-monbh rule. This was dismissed with some references to the law of the case doctrine. (T 96-101) and some other matters.

Petitioner is entitled to a speedy trial under Amendments 6 and 14 of the U.S. Constitution, and Rule 28 of the Arkansas Rules of Criminal Procedure (superseding Ark. Stat. Ann. 43-1701 et seq.).

Petitioner was prejudiced in the following fashion. Rule 28,1(b) sets a time limit of twelve months, rather than eighteen, for dismissal of charges when a defendant is confined pursuant to another conviction, the twelve months being after deduction for all excluded periods. This was not raised by counsel. Rule 28.1(b) superseded Ark. Stat Ann. 43-1708, which set a two terms of court limit, rather than three, for

persons confined to the prison on another case. This wasn't raised by counsel either. The Court's decision has dealt with whether three full terms of court had elapsed, and did not deal specifically with the issue of excluded periods.

Rule 28.1 was promulgated on July 1, 1980. It has been held to be procedural. Therefore, it would govern the interval between Petitioner's arrest in July, 1979 and his trial in February, 1981--a period of some nineteen months. Jennings v. State, 276 Ark. 217, 633 S.W. 2d 373 (1982). This Court has also held that the failure of trial counsel to frame a speedy trial issue is ground for relief under Rule 37. Clark v. State, 274 Ark. 81, 621 S.W. 2d 857 (1981). Under Clark and related cases, this Court has held that the showing of the denial of a speedy trial is sufficient; no particularized prejudice need be shown. This Court has observed that it must rule in such fashion if the speedy trial law is to have vitality.

Petitioner therefore specifically alleges that his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated by the failure of his previous attorneys to raise the speedy trial issue from the standpoint of a person confined to prison on another conviction.

Petitioner submits that an evidentiary hearing is necessary on the following points. When, precisely was Petitioner committed to prison? Precisely what periods between his arrest and first trial were excludable, and for what reasons? If the periods total less than seven months--and the record certainly indicates that they are significantly less than seven--he is en-

titled to dismissal.

Petitioner also again notes that this is his first opportunity to raise the ineffectiveness vis-a-vis speedy trial issue. Since he could not raise it earlier, it is not waived or barred by the law of the case doctrine.

VOIR DIRE

Petitioner was denied due process of law and effective assistance of counsel by his trial attorney's failure to conduct a meaningful voir dire and/or to make an appellate record with regard to its absence.

The voir dire may be found at T. 120-195 of the record of the second trial. From references within the voir dire and from its extreme brevity, it is clear that it commenced the morning of trial and was concluded, including the selection of alternates, before lunch. The jurors, although examined individually, were not examined on a sequestered basis, as is evidenced from references to questions asked the previous veneiremen. Relatively few questions were asked of any of the prospective jurors, and the last five seated (after the defense had exhausted its twelve peremptories) were not asked death penalty related questions at all, although they were death qualified by the State. Their attitudes were not seiously inquired into. Additionally, defense counsel did not make an adequate record in opposition to the death qualification of the jury and did not object to the excusal for cause of four veniremen (Burns, Faulk, Gaither, and T .Jones) under Witherspoon.

Additionally, in front of the entire panel, the following proceeding occurred:

THE COURT:...Do any of you know anything about this case?

JUROR: I'm Bernard Greenhouse. I was one of the spectators on the first case that was held here on Mr. Hayes.

THE COURT: Yeah, you attended the trial?

JUROR: Right.

THE COURT: And from that, of course, you would have heard testimony and so forth, and did you form an opinion as to guilt or innocence?

JUROR: Right.

THE COURT: Okay. I'm going to excuse you on this case...(T 121)

Thus the jury was informed that Mr. Hayes had been tried previously. There was no motion for mistrial or even a request for an admonition.

Additionally, Petitioner notes that the venireman were called for examination in alphabetical order, an event that obviously is not arrived at through random selection. There was only one defense challenge for cause and none after exhaustion of peremptories, with only seven jurors seated.

Petitioner submits that counsel was ineffective in voir dire, thus violating his rights of effective counsel (6th and 14th Amendments) and due process (5th and 14th and Art. 2 Sec. 8 of the Arkansas Constitution) by, inter alia, the failure to move for individual and sequestered voir dire; by not conducting any significant questioning of any veniremen, particularly in the latter part of voir dire, or exploration of attitides toward the death penalty and diminished capacity; by not moving for mistrial or admonition after the Greenhouse episode; by not objecting to death qualification or exclusion for cause under Witherspoon; and otherwise seeking answers necessary to an intelligent strategy of cause challenges and use of peremptories.

Petitioner submits he was therefore prejudiced. The jury thus empaneled assessed the death penalty, the highest possible punishment. Petitioner submits that the record--and its absence--shows that voir dire in the case at bar fell far short of the standard necessary in a capital case.

Petitioner seeks an evidentiary hearing to determine: Why counsel didn't move for individual and sequestered voir dire? Why did he not react to the Greenhouse episode. Why was voir dire so abbreviated? Who selected the jurors to be summoned to the courthouse for trial? What standard was used for their selection? Who arranged them in alphabetical order? Why? Why did no one object? All these matters must be developed at an evidentiary hearing. Additionally, Petitioner desires to present expert testimony from attorneys who have tried capital murder cases. Their testimony will deal with acceptable standards for voir dire in capital cases, and that this record does not meet it.

OPENING STATEMENT

Petitioner's rights of due process and effective assistance of counsel and fair trial were also abridged by the opening statement of the prosecutor and the failure of defense counsel to object to its argumentative and prejudicial nature.

The opening statement is found at T. 197-203. It includes the following passages, all delivered without defense objection;

> But in this courtroom today there are two people who are the most important witnesses who wont be here. They can't be here. They will never be here. Catherine Carter. J.W. Lunsford. There is no one that can testify for them. They

> can't testify for themselves. They really don't have voice. Their voices won't be heard with the exception of the fact that Mr. Robinson and I will be presenting our case, and hopefully their voices will be heard through our witnesses. But in the final analysis you will be their voices...(T 198)
>
> There is just one other point I want to bring up. About 2:30 that afternoon or actually earlier--Let's go to later--about 7:00 or 7:30 that night. A lot of times in the summertime there is an awful pretty sunset, awful pretty. These two people never saw it. They never saw it and never will. (T 203)

Petitioner submits these remarks went beyond the bounds of propriety for an opening statement, and by their very nature prejudiced the jury. The failure of counsel to seek even an admonition is a violation of the aforementioned rights.

In an evidentiary hearing, Petitioner will present testimony to the effect that counsel should have objected.

INSTRUCTIONS

Petitioner was also prejudiced by the failure of defense counsel to ask for a proper instruction on the law of diminished capacity short of insanity. A colloquy regarding this issue is found at T 438-441. A crucial issue in this case was Hayes' mental state, and the various gradations of homicide, reflecting the applicable mental states, were submitted to the jury. Counsel decided not to ask for an instruction regarding acquittal by reason of mental disease or defect. But, more prejudicially, he did not ask for an instruction regarding intoxication or other such problems as merely negating the intent necessary for a specific intent crime, such as the formulation of capital murder with which Petitioner was charged. A statement of the applicable law, upon which an instruction should have been based is found in Varnedare v. State, 264 Ark. 596, 573 S.W. 2d 57.

This failure is another example of the deprivation of effective assistance of counsel and due process of law as aforementioned. The prejudice is that the jury was deprived of an instruction as to the applicable law in weighing the evidence, to decide what Hayes; mental state was on July 16, 1979. The absence of instructions as to lesser included offenses, when the issue is the mental state of the actor, is of constitutional dimension. Beck v. Alabama, 477 U.S. 625 (1980). Although not deprived, techincally speaking, of the lesser included offenses, he did not have the benefit of instructions that would make the lesser offenses meaningful alternatives in the eyes of the jury. An evidentiary hearing is necessary to determine why such an instruction was not asked for, and for Petitioner to present expert testimony on why such an instruction is necessary as a matter of reasonable trial tactics.

CLOSING ARGUMENT

Petitioner was also prejudiced by the arguments and actions of the prosecuting attorney in the closing argument of the trial, and by his attorney's failure to take effective steps with regard to it, such as motion for mistrial or admonition.

For instance, the prosecuting attorney referred to a victim, Catherine Carter as "helping people, caring about people, loving, supporting them. And she gets a better job and she moves up to help her mother and her father and her 14-year-old son who is going to graduate from high school and who doesn't have a mother now and who hasn't had in two and a half years--almost three years. (T 457) This is totally irrelevant--her character was not an issue--and was a blatant attempt to appeal to the emotions of the jury. There was no objection made.

There was another such reference in final closing. (T 480). No objection was made there.

There were several blatant violations of the prohibition against "Golden Rule" arguments. (T 477, 480). No objection was made.

The prosecutor attempted to taunt Petitioner in his final closing, so much that this proceeding occurred:

> MR. BROWN:....but she doesn't know when she's got her last heartbeat until this defendant walks over and he...
>
> MR. HAYES: Keep your finger out of my face.
>
> MR. BROWN: Well, there's an example right there, a good example.
>
> MR. JAMISON: Your Honor, I object. (T 480)

No ruling was made on the objection; however, it is abundantly clear from the record that the prosecutor waved his finger in the Petitioner's face, hoping to elicit a reaction that he would use to inflame the jury.

PENALTY PHASE

Petitioner was prejudiced by the failure of counsel to call mitigation witnesses in the penalty phase of the trial, and by his failure to object to statements of the prosecuting attorney.

Counsel called no witnesses in the penalty phase. (T 494 et seq). Mitigating circumstances are specifically not limited by Ark. Stat. Ann 41-1304, but one specifically enumerated is whether "the capital murder was committed while the capacity of the defendant to appeciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse. In the record there is a report from Dr. Gregory Krulin that contains evidence in suppport of that mitigating circumstance. (T 22)

But he was not called as a witness.

Moreover, in the introduction of Petitioner's prior convictions the prosecutor--without objection or request for mistrial or admonition by defense counsel--stated that Petitioner's prior conviction for second degree murder had been reduced from an original charge of first degree murder. That statement was completely prejudicial inasmuch as the prosecutor in that very district had reduced the charge on a negotiated plea; that it was originally a higher charge to which Petitioner had been acquitted was completely irrelevant. (T 507).

These actions and omissions constituted breaches of Petitioner's rights of due process and effective assistance of counsel. The prejudice is that Petitioner was sentenced to death after this penalty phase, in which the jury was not given an opportunity to hear information regarding Petitioner's mental state that could have been considered in mitigation, and had heard that he had once been charged with first degree murder. It certainly cannot be said that the jury would have returned a death penalty had this evidence been submitted, and it cannot be said that the remarks about the reduced charge did not influence the jury. Thus the death penalty cannot stand. Neal v. State, 623 S.W. 2d 191 (1981).

An evidentiary hearing is necessary to explain all the details of Dr. Krulin's testimony, and of other possible witnesses, and for defense counsel to explain why he was not called.

Petitioner expects that the State will argue that Petitioner waived the right to present mitigation evidence. That is another point for an evidentiary hearing: Did this

capital defendant, whose mental state has been an issue all along, knowingly and competently waive--and could he knowingly and competently waive, his right to present mitigation evidence in the lenalty phase?

ACCUMULATION OF ERRORS AND OMISSIONS

It has been recognized that there are occasions where the performance of counsel is such that, while there is no one act or omission that is per se ineffective, the accumulation of such actions and omissions makes the totality of the circumstances one of ineffectiveness of counsel at trial. Harris (Johnny Frank) vs. Lockhart. (8th Cir., 1983).

Petitioner's position is that any one of the matters contended in this petition is sufficent for relief to be granted, but in the event that this Court does not agree, Petitioner specifically alleges that the totality of the circumstances mandates reversal as well.

PENALTY PHASE VERDICT FINDINGS

The sentence of death must be set aside because the verdict is against the law.

Specifically, the jury found one aggravating circumstance---past violent conduct.

However, Ark. Stat. Ann. 41-1302 requires that proof be made of aggravating circumstances--plural. Since only one circumstance was found, the death penalty must be set aside.

PROPORTIONALITY

Petitioner's sentence is against the law and is out of proportion for the crime for which he was convicted, thus violating his rights under the 5th, 8th and 14th Amend-

ments. Specifically, when compared with other capital defendants who were not charged with the commission of an underlying felony, regarding whom there was a question as to his mental state and capabilities, and regarding whom the aggravating circumstance(s) were of such paucity, the death penalty is out of proportion, violates due process of law and is cruel and unusual.

An evidentiary hearing is necessary to place all of the documentation in the record.

SEEKING DEATH AFTER OFFERING PLEA

Petitioner was afforded the opportunity to plead guilty and receive a life sentence, including on the day of trial.(T 116-119). However, he exercised his right to a jury trial instead. Petitioner submits that it is a violation of his rights of due process and against cruel and unusual punishment to seek the death penalty after offering to let him plead guilty.

It is an accepted proposition that the death penalty is different in kind, rather than in degree, from other punishments. Certainly, if the State felt that a sentence of life without parole would be appropriate, it should be estopped from seeking to enforce a death sentence.

OTHER ISSUES

Petitioner is cognizant of this Court's rule that issues previously litigated on direct appeal are not a proper subject of Rule 37 relief. Petitioner, for purposes of the record, hereby reasserts that his Fifth Amendment rights were violated by the introduction of statements alleged to have been taken from him before provision of

counsel. Petitioner did not voluntarily and intelligently waive his rights to counsel andto silence, and all statements should have been suppressed.

Petitioner also submits that the death penalty is per se cruel and unusual punishment.

Petitioner also submits that he was not sane at the time of trial, and is not sane at this time. An evidentiary hearing is necessary to determine his status both then and now.

WHEREFORE, Petitioner prays that this Court reverse and dismiss Petitioner's conviction on the speedy trial issue; vacate the death sentence and prohibit retrial with a death penalty being sought on the issue of the finding of only one aggravating circumstance; vacate the death penalty otherwise, vacate the conviction otherwise; and/or remand the case to the Circuit Court of Jefferson County for an evidentiary hearing.

T.J. HAYES,

By: Jeff Rosenzweig

JEFF ROSENZWEIG
710 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
Attorney for Petitioner, pro bono

VERIFICATION

I, Jeff Rosenzweig, do hereby state that the allegations herein are true to the best of my knowledge, information and belief, and that this petition is meritorious and is not filed for purposes of delay.

Jeff Rosenzweig

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have delivered a copy of the foregoing to Matthew Fleming, Asst Attorney General, this 24 day of October, 1983.

Jeff Rosenzweig

SUPREME COURT OF ARKANSAS

No CR 82-113

T. J. HAYES
Petitioner

v.

STATE OF ARKANSAS
Respondent

PETITION TO PROCEED IN CIRCUIT COURT PURSUANT TO CRIMINAL PROCEDURE RULE 37 and PETITION FOR STAY OF EXECUTION

PETITIONS DENIED

PER CURIAM

Petitioner T. J. Hayes was convicted by a jury of the capital felony murder of Catherine Carter and J. W. Lunsford. He was sentenced to death. We reversed and remanded the case for a new trial. Hayes v. State, 274 Ark. 440, 625 S.W.2d 498 (1981). On retrial, petitioner was found guilty and again sentenced to death. The conviction and sentended were affirmed. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662 (1983). Petitioner then sought a writ of certiorari before the United States Supreme Court. After his petition was denied on October 3, 1983, petitioner filed the petition for stay of execution and petition to proceed pursuant to A.R.Cr.P. Rule 37 which are now before us. Finding no grounds for postconviction relief, both petitions are denied.

Catherine Carter's parents testified at trial that Catherine and petitioner, both of whom were black, got into a cab driven by a white driver at about 2:30 p.m. on July 16, 1979. At approximately that time a security guard at the Arkansas Department of Correction saw petitioner and a black female pass by on Princeton Pike in a Yellow Cab driven by a white male. According to petitioner's statement to police he told the cab driver, J. W. Lunsford, to stop at an unoccupied house on Princeton Pike. When the three got out of the cab, petitioner, who was armed with a .38 caliber pistol, shot Lunsford twice, killing him. Petitioner and Catherine entered the house

where petitioner shot her twice. As petitioner was driving the cab to a wooded area to hide it, he was seen by the same security officer who had seen the cab earlier. Later that day, petitioner walked into the Jefferson County Sheriff's Office and announced that he had just killed his girlfriend. He then led officers to the two bodies and showed them where the cab was hidden. After being advised of his rights, he gave a statement describing the two murders.

In his petition for postconviction relief, petitioner first argues that he was denied a speedy trial. This issue was raised in the first appeal and found to be without merit. We declined to consider the question again on the second appeal and will not entertain it now in a petition for postconviction relief. Houser v. United States, 508 F.2d 509 (8th Cir. 1974); Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980). Petitioner contends that the issue is not barred from reconsideration, however, because he is couching it in terms of ineffective assistance of counsel: that is, counsel should have raised the issue as a violation of his rights under another rule of procedure, A.R.Cr.P. Rule 28.1 (b). The allegation is essentially conclusory. Petitioner merely states that Rule 28.1 (b) in effect at the time of his first trial was violated. He asks for a hearing on precisely when petitioner was committed to prison after his parole was revoked on another charge and precisely what were the excludable periods between arrest and the first trial. He does not give any factual support for his claim that a hearing would demonstrate the denial of a speedy trial. Rule 37 is not available to the petitioner who wishes to have a hearing in the hopes of finding some ground for relief.

Petitioner next alleges that he was denied due process of law and effective assistance of counsel by counsel's failure to conduct a meaningful voir dire of the jury panel and counsel's failure to make an adequate appellate record of the voir dire. Petitioner specifically cites counsel's failure (1) to request a sequestered voir dire; (2) to ask death penalty related questions of the last five jurors

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seated; (3) to make an adequate record in opposition to the death qualification of the jury; (4) to object to the excusal for cause of veniremen Burns, Faulk, Gaither and T. Jones under Witherspoon; (5) to object to the veniremen being called in alphabetical order rather than by random selection; (6) to make more than one defense challenge for cause; (7) to conduct meaningful questions about attitudes toward the death penalty and diminished capacity; (8) to ask for a mistrial or admonition after venireman Greenhouse mentioned that he had attended petitioner's first trial; and (9) to seek answers during voir dire on which to develop an intelligent strategy of challenges. Petitioner states that if an evidentiary hearing is held, he will present expert testimony from attorneys to show that the voir dire was inadequate for a capital case.

Petitioner's long list of counsel's shortcomings fails to demonstrate the need for an evidentiary hearing because he does not show that any juror was unqualified to serve. Jurors are presumed to be unbiased and qualified. Urquhart v. State, 275 Ark. 486, 631 S.W.2d 304 (1982). Petitioner's bare allegation that he was prejudiced by counsel's conduct during voir dire which is unsupported by any showing of actual prejudice does not establish ineffective assistance of counsel. See Hill v. State, 278 Ark. 194, 644 S.W.2d 282 (1983); Smith v. State, 264 Ark 329, 571 S.W.2d 591 (1978). We also note that a death qualified jury is constitutional. Rector v. State, 280 Ark. _____ (October 17, 1983).

The prosecutor made references in his opening statement to the victims' inability to be witnesses at the trial and their inability to enjoy life. He also said the jury would have to be the victims' voice at the trial. Petitioner asserts that these remarks were prejudicial and a denial of due process. He further contends that counsel should have requested an admonition from the court.

When an issue is not raised at trial, as the issue of the

propriety of the state's opening statement was not, the issue cannot be raised under Rule 37 unless the question is so fundamental as to render the judgment void and open to collateral attack. Neal v. State, supra. Even questions of constitutional dimension are waived if not raised in accordance with the controlling rules of procedure. Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981). We do not find that the prosecutor's remarks render the judgment here void. We also cannot say that counsel was remiss in not objecting. There is a presumption of effective assistance of counsel. Hill, supra. To overcome that presumption, a petitioner must show by clear and convincing evidence that some prejudice resulted from counsel's representation and that the prejudice was such that he did not receive a fair trial. Blackmon v. State, 274 Ark. 202, 623 S.W.2d 184 (1981). Petitioner has not shown prejudice and the denial of a fair trial by counsel's failure to request an admonition.

According to petitioner his attorney called no witnesses in the penalty phase of the trial even though the record contains the report of a doctor which allegedly contained evidence in support of a mitigating circumstance. The failure to call witnesses in the penalty phase is not in itself an indication of ineffective assistance of counsel. Collins, supra. Counsel must use his own best judgment to determine which witnesses, if any, will be beneficial to his client. Hill, supra. (The record indicates that petitioner himself asked that his sister not testify.) Petitioner does not say to what the doctor would have testified had he been called beyond the conclusory allegation that the doctor's report would have supported the mitigating circumstance of diminished capacity. An allegation with no factual support is not grounds to find that counsel should have called a particular witness. Hill, supra.

Petitioner anticipates that the state would argue that he waived his right to present mitigating evidence. He contends that his mental condition was such that he could not competently waive the issue. If this is an attempt to raise the question of petitioner's mental

state at the time of trial, it cannot succeed because Rule 37 was not intended to provide a method for raising questions which are properly considered at trial and on appeal. Swindler v. State, 272 Ark. 340, 716 S.W.2d 1 (1981).

Petitioner also complains that during the penalty phase the state mentioned that his prior conviction for second degree murder had been reduced from a charge of first degree murder. He alleges that counsel should have objected and asked for an admonition or a mistrial. Although petitioner alleges prejudice, he has not established it. Counsel may well have chosen to remain silent to avoid drawing the jury's attention to the remark.

The state referred to the victim Catherine Carter in its closing argument as a loving woman who helped support her parents and who left a teenage son. Petitioner contends that her character was not in issue and that the remark should have elicited an objection from counsel. The victim's mother had already characterized her daughter as a church member who helped support her parents. The mother also testified that the victim had a son. Defense counsel objected to the testimony as irrelevant and the objection was sustained. Some of this same information was reiterated in the state's closing argument but there is no basis to conclude that petitioner was denied a fair trial by counsel's failure to object to it at that point. The jury had already heard about the victim's character. As a matter of trial strategy counsel may have decided to allow the information to be heard again rather than object and appear reluctant for the jury to know about the victim's background. Another attorney may have reacted differently, but in any event, petitioner has not shown that counsel's conduct prejudiced him or amounted to any more than a tactical decision. Matters of trial strategy are often open to debate and do not provide grounds for postconviction relief. Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973).

Petitioner gives three page numbers from the record and

alleges that there are examples of violations of the prohibition against "Golden Rule arguments" on those pages. Page numbers where examples may be found are not sufficient, however, to demonstrate prejudice. Petitioner also alleges that the prosecutor waved his finger in his face during closing argument to taunt him and inflame the jury. There was an objection to this but no ruling.

The jury in this case was instructed that closing arguments are not evidence. Experienced counsel in this case, or any case, could disagree as to the influence a particular closing argument had on the jury's verdict. Before a petitioner can prevail on an allegation that counsel was wrong in not objecting during closing argument, he must establish that he was denied a fair trial by the failure to object. Mere errors, omissions or mistakes, improvident strategy or bad tactics will not suffice to require an evidentiary hearing. Measure, supra. At most, petitioner here has shown mere error or bad tactics on the part of counsel.

Petitioner waived the defense of insanity. He now asserts that counsel was ineffective in not requesting a jury instruction on diminished capacity, intoxication or "other such problems." Although a specific instruction was not given on intoxication or diminished capacity, petitioner's allegation that one was needed is too vague to warrant a hearing. Petitioner declared to the court that he was pleading "just plain not guilty," not "not guilty by insanity or nothing like that." The jury was instructed on the intent necessary to find petitioner guilty of capital murder and the lesser included offenses of murder in the first and second degrees and manslaughter. The instruction on second degree murder covered homicide committed under extreme emotional disturbance, thus affording the jury an opportunity to consider the possibility that petitioner was emotionally disturbed. The jury's verdict indicates that it found no such disturbance; but even if no instructions had been given on the lesser included offenses, petitioner has offered no good reason to suggest that counsel was incompetent by virtue of his not requesting a separate instruction.

While conceding that the jury was instructed on the lesser included offenses to capital murder, petitioner argues that the instructions given were not meaningful to the jury. The allegation is conclusory and not deserving of a hearing. Smith, supra.

The jury found one aggravating circumstance. Petitioner alleges that Ark. Stat. Ann. §41-1302 (Repl. 1977) requires more than one aggravating circumstance because the statute refers to aggravating circumstances in the plural. We find no merit to the argument. Ark. Stat. Ann. §1-201 (Repl. 1977) provides:

> PLURAL WORDS. - Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used. [Rev. Stat., ch. 129, § 20; C. & M. Dig., §9726; Pope's Dig., §13252.]

Ark. Stat. Ann. §41-1302, therefore, requires only that the jury unanimously find at least one of the aggravating circumstances set out in §41-1303 to exist before it can impose the death penalty.

Petitioner assets that the imposition of the death penalty in his case is not in proportion to the crime committed when compared to other capital defendants. On appeal, this Court found no evidence that the jury's verdict was based on passion or prejudice. We further found that the imposition of the death penalty was not arbitrary, capricious or wanton. In comparing petitioner's case to other cases in which the death penalty was imposed, we did not find the sentence excessive. The aggravating circumstances of petitioner's prior felony conviction outweighed beyond a reasonable doubt any mitigating circumstances. There is no cause to deviate from those findings now.

Before trial began petitioner was offered the opportunity to enter into a plea bargain whereby he would plead guilty and accept a sentence of life imprisonment without parole. He declined the offer. He now alleges that it was a violation of his constitutional right to due process and constituted cruel and unusual punishment for the state to seek the death penalty after he elected to have a jury trial instead of pleading guilty. There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate Ark. Stat. Ann. §§41-1301-1304 (Repl. 1977), which set

(1982), cert. denied, ___U.S.___(1982).

Petitioner concedes that this Court has already ruled on certain issues which cannot be raised again under Rule 37. To assure exhaustion of state remedies, however, he alleges that his statement was not admissible; the death penalty is cruel and unusual punishment; and he was insane at the time of trial and remains insane today. We agree that these issues are not properly raised under our postconviction rule.

Finally, petitioner asks this Court to find that the cumulative effect of counsel's errors and omissions rendered his representation ineffective. There are no perfect trials. Due process demands only that the accused receive a fair trial. Roleson v. State, 277 Ark. 146, 640 S.W.2d 113 (1982). Petitioner has alleged imperfections but he has not established prejudice from the representation of counsel such that his trial was unfair. Accordingly, he has not met the burden of proving ineffective assistance of counsel.

Petitions denied.

Dudley and Purtle, JJ., dissent.

SUPREME COURT OF ARKANSAS

No. CR 82-113 11-2-83

Opinion Delivered

T. J. HAYES, PETITIONER

V.

STATE OF ARKANSAS, RESPONDENT

DISSENTING OPINION

ROBERT H. DUDLEY, Associate Justice

The petitioner has been sentenced to death. He pleads that he received the sentence of death, rather than life imprisonment without parole, solely because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment of the Constitution of the United States.

Death as a penalty is qualitatively different from all other punishments. It is to be imposed only after a structured exercise of discretion, which can be thwarted by incompetent representation. The petitioner's allegations of ineffective representation, whether or not conclusory, are sufficiently serious to raise questions about a failure to present evidence which, in turn, would undermine the predicate for the structured discussion. Those questions should be rightfully answered before the petitioner is executed. I would grant the evidentiary hearing and stay the execution.

I am authorized to say that Purtle, J. joins in this dissent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

83-6009

T.J. HAYES — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

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MOTION TO PROCEED IN FORMA PAUPERIS

Comes T.J. Hayes, Petitioner herein, through his attorney, Jeff Rosenzweig, serving pro bono publico and in support of his Motion to Proceed In Forma Pauperis states:

1. Petitioner is confined on Death Row of the Cummins Unit of the Arkansas Department of Correction. He has no assets nor income, and has been represented by appointed or pro bono counsel at all stages of this litigation. He has been found indigent by the Circuit Court of Jefferson County and the Supreme Court of Arkansas.

2. Counsel is receiving, and has received, no remuneration of any sort for representation of Petitioner, expects none, and has no contract for any.

WHEREFORE, Petitioner prays that this Motion to Proceed In Forma Pauperis be granted.

JEFF ROSENZWEIG
710 Three Hundred Spring Bldg.
Little Rock, Ark. 72201
501-372-5247
Attorney for Petitioner pro hac vice and pro bono publico

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing by first class mail postage prepaid to Alice Ann Burns, Deputy Attorney General, Justice Building, Little Rock, Ark. this 29 day of December, 1983.